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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

MEMPHIS NATURAL GAS COMPANY, A Corporation, Petitioner,

VS.

GEORGE F. McCANLESS, Commissioner of Finance and Taxation, State of Tennessee, Respondent.

No. 219

FRANCHISE TAX CASE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

This suit was brought by petitioner against respondent in the Chancery Court of Davidson County, Tennessee to recover franchise taxes, interest and penalties aggregating $22,154.22 paid under protest for the tax-paying periods July 1, 1939 through July 1, 1942. The Chancery Court denied recovery. The Supreme Court of Tennessee,

on February 5, 1944, ordered a refund of penalties, but affirmed liability for franchise taxes and interest. R268.

The statute here involved is:

> "Section 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, That all corporations organized under the laws of the State of Tennessee, other than those organized for general welfare and not for profit, and all corporations organized under the laws of any other state or country for profit and doing business in Tennessee, shall, without exception other than as provided in Section 2 hereof, pay to the Commissioner of Finance and Taxation annually a privilege tax in addition to all other taxes, the rate and measure of which are hereinafter set forth. The tax hereby imposed shall be paid for the privilege of engaging in business in corporate form in this State and shall be in addition to all other taxes levied by any other Act.
>
> * * * *
>
> "The privilege tax hereby imposed shall be a tax of fifteen (15c) cents on the One Hundred ($100.00) Dollars, or major fraction thereof, of the issued and outstanding stock, surplus and undivided profits of each such corporation as shown by the books and records of such corporation at the close of its last calendar or fiscal year preceding the making of the sworn report hereinafter required."
>
> Chapter 100, Tennessee Public Acts 1937, p. 379, Code 1248.143.

A subsequent section of the franchise statute sets forth the measure of the tax as provided in an allocation formula. We have no question about the fairness of the allocation formula used by respondent. If petitioner be liable for any franchise taxes, the amount assessed is equitable.

Petitioner is a Delaware corporation with it general offices at Memphis, Tennessee and is engaged solely in the maintenance and operation of an interstate natural gas transmission line transporting natural gas for sale and delivery at wholesale to distributing companies at various delivery points on the system.

The pipe line originates in Louisiana, passes through the southeast corner of Arkansas, crosses the Mississippi River into Mississippi and thence north into Tennessee, skirts Memphis and terminates at Jackson, Tennessee. Map Ex. 1, R. 26.

Petitioner has compressing stations in Louisiana, Arkansas and Mississippi and numerous delivery points on its line where the gas is measured by a meter and the gas pressure reduced by a mechanical regulator before delivery to the distributing companies.

All deliveries in Tennessee are made to the distributing companies which are customers of petitioner. There are but two, the Memphis Light, Gas & Water Division, owned by the City of Memphis, and the West Tennessee Gas Company, a private corporation.

It is undisputed that petitioner, after transporting the gas from Louisiana into Tennessee, does absolutely nothing other than to deliver same to the distributing companies. Petitioner has no interest in the distributing companies or their earnings or their properties, and petitioner's sole interest and activity in Tennessee is the operation of its interstate pipe line and the maintenance of general offices in Memphis which are accessory to the interstate business. R. 42-47.

Petitioner's business and activities in Tennessee are solely of an interstate nature. The collection of these franchise taxes violates the Commerce Clause of the United States Constitution, Article I, Section 8, prohibiting the exaction of a franchise or privilege tax for the right to engage exclusively in interstate commerce.

The Supreme Court of Tennessee has concluded that this court has recently authorized the collection of franchise taxes from a foreign corporation engaged exclusively in interstate commerce. Petitioner admits there would be liability if petitioner were doing any intrastate business in Tennessee, but such is not the case. The Supreme Court of Tennessee did not find that petitioner is doing local or intrastate business, but affirmed the tax because recent decisions of this court are said to warrant this result.

II.

STATEMENT OF JURISDICTION

The statute believed to sustain jurisdiction is 28 USCA, Par. 344(b):

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had *** where any title, right, privilege or immunity if specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States."

The Federal questions sought to be reviewed were raised by the pleadings in the court of first instance.

Paragraph IV of the complaint states in part:

"(a) Complainant has done no intrastate business in Tennessee since said date, and the plain legislative intent requires the payment of the franchise tax by a foreign corporation only if 'doing business in Tennessee', which means intrastate business.

"(b) The State of Tennessee may not exact a franchise tax, which is the equivalent of a privilege tax, of the complainant for the right to do an interstate business as such a tax violates Article I, Section 8, United States Constitution that 'The Congress shall have power to regulate commerce with foreign nations, and among the several States.' The enforcement of the tax against complainant also violates the Fourteenth Amendment, Section I of the United States Constitution 'nor shall any State deprive any person of life, liberty, or property, without due process of law.' Congress has not authorized the States to exact of corporations a franchise or privilege tax for the right to do an interstate business. In addition, the enforcement of the tax against complainant violates the due process of law clause of the Federal Constitution as the imposition and enforcement of the tax against complainant results in the State of Tennessee collecting taxes from properties and business beyond the boundaries of the State of Tennessee and not fairly attributable to the State of Tennessee."

R. 250, 251.

The Federal questions were raised in the Supreme Court of Tennessee by reference to the pleadings and assignments of error as shown by the opinion. R. 268.

February 5, 1944, opinion by the Supreme Court of Tennessee. R. 268.

February 10, 1944, decree entered ordering refund to petitioner of penalties totaling $4,169.04. R. 267.

February 16, 1944, petition by respondent to have the court settle differences among counsel about the proper decree. R. 269. (As permitted by Rules 32 and 33 of the Supreme Court of Tennessee, 173 Tenn. 886).

February 19, 1944, petition by Memphis Natural Gas Company for entry of decree in conformity with its interpretation of the court's opinion. R. 273. (As permitted by Rules 32 and 33 of the Supreme Court of Tennessee, 173 Tenn. 886.)

March 4, 1944, the Supreme Court of Tennessee denied petitions to rehear and reconsider the decree theretofore entered and the judgment became final. R. 277.

May 29, 1944, order extending certiorari time to and including July 5, 1944. R. 281.

This petition for certiorari is being filed prior to July 5, 1944.

The Supreme Court of Tennessee has decided these Federal questions of substance in a way probably not in accord with applicable decisions of this court.

The Federal questions here involved seem to be identical with those in Spector Motor Service, Inc. v. McLaughlin, 139 Fed. (2) 809 (2 C., Dec. 24, 1943) and in which this court granted certiorari on May 23, 1944.

III.

THE QUESTIONS PRESENTED

1.

Tennessee cannot exact a franchise tax from a foreign corporation engaged solely in interstate commerce. It violates the Commerce Clause of the United States Constitution, Article I, Section 8.

2.

The maintenance of general offices in Tennessee by a foreign corporation engaged exclusively in interstate commerce does not change the rule that Tennessee cannot exact a franchise tax from such business so engaged solely in interstate commerce as the maintenance of the general offices are a part of and accessory to interstate commerce.

3.

A pipe line company is engaged exclusively in interstate commerce when it transports natural gas from one State to another and sells it wholesale to distributing companies and to an industrial consumer which takes the gas from a distributing system owned and operated by a distributor.

IV.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

In order for this franchise tax to be collectible from the petitioner it must appear that petitioner is engaged in some intrastate business. If the foreign corporation be engaged in both kinds of business and the franchise tax is apportioned to the business fairly attributable to the taxing State, it is then permissible, but a franchise tax

upon a foreign corporation engaged exclusively in interstate commerce seems to violate the Commerce Clause. This court has several times decided in the past that even though the foreign corporation so engaged exclusively in interstate commerce maintains general offices within the taxing State, it nevertheless cannot be held liable for franchise taxes as such a result is violative of the Commerce Clause.

The decision of the Supreme Court of Tennessee affirming liability is based squarely upon Memphis Natural Gas Co. v. Beeler, 315 U. S. 649 involving petitioner's Tennessee excise tax liability for the years 1932 through 1935, but the decision is not applicable here because the facts there involved are totally dissimilar to those here involved. The excise tax is a privilege tax and likewise the franchise tax is also a privilege tax. The Supreme Court of Tennessee concluded that since petitioner was held liable for excise taxes in Memphis Natural Gas Co. v. Beeler, supra, for the years 1932 through 1935, it must be liable for franchise taxes.

Liability in said decision of Memphis Natural Gas Co. v. Beeler, supra, was adjudged because petitioner was, in those years, doing intrastate business in Memphis by virtue of being a partner of the Memphis Power & Light Company in the distribution of gas. The contract then in affect between petitioner and the Memphis Power & Light Company was construed by both the Supreme Court of Tennessee and this court to be a partnership engagement described as "a profit-sharing joint adventure in the distribution of gas" and that the two companies were "in effect partners or joint enterprisers in the distribution and sale of gas to Tennessee consumers."

This court said:

> "* * * the taxpayer's net earnings under the contract were subject to local taxation."

Petitioner was therefore held liable for the excise taxes as it was engaged in those years in local or intrastate business. But petitioner discontinued that intrastate business on June 27, 1939.

The Memphis Power & Light Company sold on June 27, 1939 its distribution properties to the City of Memphis, was liquidated and the contract involved in Memphis Natural Gas Co. v. Beeler, 315 U. S. 649 was terminated as of said date. R. 135-143.

The franchise taxes here involved are for the years subsequent to the termination of the contract with the Memphis Power & Light Company on June 27, 1939. Petitioner voluntarily paid the franchise taxes due prior to July 1, 1939 as it was engaged during those years in intrastate business, but has paid under protest the franchise taxes due July 1, 1939 and subsequently.

Since said date of June 27, 1939 petitioner has had no interest in or partnership arrangement with any distributing company, and its sole interest and activity in Tennessee is the ownership and operation of its interstate pipe line.

The Supreme Court of Tennessee reached its conclusion that petitioner is liable for franchise taxes subsequent to June 27, 1939 by reference to dicta in Memphis Natural Gas Co. v. Beeler, 315 U. S. 649:

"In any case if taxpayer's business were wholly interstate commerce, a non-discriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there * * * is not prohibited by the Commerce Clause on which alone taxpayer relies."

We refer to this paragraph as dicta because the only question involved in the former appeal was whether or not petitioner was engaged in some intrastate business. The excise tax statute in effect in the years involved in the former appeal levied the tax against net earnings "arising from business done wholly within the State, excluding earnings arising from interstate commerce."

Memphis Natural Gas Co. v. Beeler, 315 U. S. 649.

After having found that petitioner, in those years, was engaged in some intrastate business, this court made, at the conclusion of the opinion, the general observation set forth above. We respectfully submit that the former appeal did not involve questions of income taxation which are wholly different from the question of franchise tax liability of a foreign corporation engaged exclusively in interstate commerce.

The paragraph in question, quoted supra, was recognized and labeled as dictum in Spector Motor Service, Inc. v. McLaughlin, 139 Fed. (2) 809 (2 C.).

The former appeal could not have involved income taxes as they are expressly prohibited by the Tennessee Constitution.

Obviously, the dictum dealing with income taxes can have no relevancy to the franchise taxes here involved.

The Supreme Court of Tennessee concluded in this franchise tax suit that the dictum relating to principles of income taxation is so strong and comprehensive that petitioner is also liable for franchise taxes. Such reasoning seems unsound as income taxes and franchise taxes are basically different. Petitioner conceded in the Supreme Court of Tennessee that it is liable for these franchise taxes if it be found that petitioner has been engaged in intrastate business since June 27, 1939, but the court did not so find. It simply concluded that petitioner is liable for franchise taxes because of its decision in the companion appeal that petitioner is liable for excise taxes and predicated its decision upon the dictum in Memphis Natural Gas Co. v. Beeler, supra. When speaking of the dictum, the Supreme Court of Tennessee said in the present companion excise tax suit opinion:

> "From the foregoing it seems evident that the Supreme Court ruled that if, as insisted, all complainant's business was interstate and it was engaged in no joint enterprise of distribution, nevertheless it was still liable for the tax."
>
> R. 231.

Whatever may be said about the dictum, it has no relationship to or influence upon this question of franchise taxes.

In Memphis Natural Gas Company v. Beeler, 315 U. S. 649, this court held that from 1932 to 1935 petitioner was engaged in intrastate business in Tennessee and therefore liable for the excise taxes. Having thus decided the case the court observed, when speaking generally of permissible taxation under the Commerce Clause, that a foreign corporation, engaged exclusively in interstate commerce

and having a commercial domicile within the taxing State, can be held liable for a non-discriminatory income tax upon net income attributable to activities within the taxing State.

This franchise tax certainly cannot be justified by applying to it principles of income taxation. Our question is whether or not a foreign corporation with its general offices in Tennessee and engaged exclusively in interstate commerce can be held liable for franchise taxes.

This court has many times in the past decided that this cannot be done. There is nothing in Memphis Natural Gas Co. v. Beeler, supra, authorizing such a result.

Petitioner respectfully submits that the decision of the Supreme Court of Tennessee is in direct conflict with Ozark Pipe Line Co. v. Monier, 266 U. S. 555, where a Maryland corporation qualified for business in Missouri, operated a pipe line from Oklahoma through Missouri to Illinois, maintained in Missouri two general offices and was held not liable for the Missouri franchise tax imposed on corporations. The same conclusion was reached in Alpha Portland Cement Co. v. Commonwealth of Massachusetts, 268 U. S. 203, involving an excise tax. There are many other cases to the same effect.

Petitioner respectfully submits that the Supreme Court of Tennessee has decided this Federal question of substance in a way probably not in accord with applicable decisions of this court.

The Supreme Court of Tennessee pretermitted the question of whether or not petitioner is engaged exclusively in interstate commerce and stated in the companion excise tax opinion:

> "We do not find it necessary to pass on this con-

> troversy here in view of the decision of the Supreme Court of the United States in Memphis Natural Gas Co. v. Beeler, supra."

It concluded that the dictum in Memphis Natural Gas Co. v. Beeler makes petitioner liable not only for the excise taxes in the companion appeal, but also liable for these franchise taxes whether or not petitioner be engaged exclusively in interstate commerce. This seems fallacious for the reasons heretofore pointed out.

There can be no doubt that a pipe line company such as petitioner is engaged exclusively in interstate commerce as this proposition has been settled many times by this court and as recently as in Illinois Gas Co. v. Public Service Co., 314 U. S. 498.

The respondent makes the argument that petitioner is engaged in intrastate commerce because of the character of one of its customers in Tennessee. Petitioner has three customers in Tennessee. Two of them are distributing companies and the other is the Memphis Generating Company, which is several miles removed from petitioner's pipe line system and is served by the distributing system of the Memphis Light, Gas & Water Division. The Memphis Generating Company takes its gas directly from the distribution system of the Memphis Light, Gas & Water Division. As the gas passes from the distributing system into the plant of the Memphis Generating Company it is measured, and the Memphis Generating Company pays petitioner directly for the same on a monthly basis.

> See the Map, Exhibit 2, R. 40, showing the Memphis Generating Company on the distributing system and several miles distant from petitioner's pipe line. Also R. 44, 56.

It seems unnecessary to argue the proposition that this does not constitute intrastate business. It has been expressly so decided in Illinois Gas Co. v. Public Service Co., 314 U. S. 498 and also in Memphis Natural Gas Co. v. McCanless (Gross Receipts Tax Case), ____Tenn.____, 177 S. W. (2) 841, decided February 5, 1944, which is a companion suit but not here involved as the Supreme Court of Tennessee ordered the gross receipts taxes refunded to petitioner.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Tennessee commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the Supreme Court of Tennessee be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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